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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DALE EDWARD SMITH, Defendant and Appellant.	G050213 (Super. Ct. No. 12WF0417) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John L. Flynn, Judge. Affirmed.

Richard Power, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Anthony Da Silva, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

I. INTRODUCTION

In April 2014, the trial court sentenced Dale Smith, then 64 years old, to six years in prison for dealing methamphetamine while armed with a firearm.[1] His argument on appeal is that because of his poor health – particularly the need to wear a colostomy bag – six years amounts to cruel and unusual punishment and he should have been given probation. His argument is predicated on two factors: the sentence length in relationship to his age and the *probability* that he will not receive adequate medical care in California's prison system. Smith posits that given his poor health and the probability of inadequate prison medical care, his six-year sentence amounts to a de facto LWOP. But Smith offered no evidence to the trial court of a probability of inadequate medical care. His argument is unpersuasive and we affirm the judgment.

II. FACTS

A few days after a sting operation in January 2012 in which undercover detectives purchased methamphetamine from him, Smith was arrested at his home in Cypress. Police found more than 75 bindles of methamphetamine in one drawer and a loaded handgun in another. Officers also found two unloaded rifles in a closet and an unloaded handgun in an open safe. Two hand grenades – one with an active fuse were also found. Smith presents no argument on appeal as to the sufficiency of the evidence to sustain his conviction, so we may move on to the probation report and the ensuing sentencing.

In his presentencing interview in April 2014, Smith had to wear a colostomy bag. The record is not clear as to precisely how he came to need one. Smith's story was that at the time of his arrest police officers threw him on the ground, rupturing his stomach, and it was that rupture that resulted in the colostomy bag. There is some corroboration to that story in the probation report, which noted that prior to booking

[1] The constituents of the sentence are two years for violation of Health and Safety Code section 11370.1, subdivision (a) [dealing methamphetamine] plus a four-year enhancement under Penal Code section 12022.

Smith had been admitted to an intensive care unit at Western Medical Center "for multiple health concerns." But the report does not mention precisely what those health concerns were. Smith also said his colostomy bag was the result of "'botched surgery,'" but indicated it was remediable; he said he was awaiting "further procedures to get [the bag] removed."

Smith also claimed heart problems: He said he has had a family history of heart disease. He had heart surgery in 2002, resulting in a six-way bypass. Four stents were implanted in 2006 and another four in 2009. He told a probation officer he has had 15 heart attacks and 4 strokes. He said he was medically retired from his former occupation as a welder (apparently since 2012 when he began "collecting disability").

The report does not indicate Smith made any special plea for probation based on his poor health. His main focus was the circumstances of his crime: he stoutly maintained his innocence. Smith said he has been "using methamphetamine every day since the age of 25," but he claimed he stopped after his 2002 heart surgery (but conceded being arrested for methamphetamine possession in 2006). He admitted to owning a small armory, which, if we count correctly, included no less than three shotguns, at least twelve rifles, and at least three handguns. But there were discrepancies in his stories about past arrests and who, precisely, (his son or daughter) had current possession of his arsenal. So, perhaps not surprisingly given such discrepancies, Smith did not impress his probation officer with his veracity. The report states that "Throughout the interview the defendant provided information of dubious veracity."

Summing up, the probation report noted the aggravating factor of the sophistication of his methamphetamine dealing (pre-packaged bundles meant that Smith was not just an addict selling part of his supply ad hoc) reflecting a "professional" approach to his dealing, plus an inventory necessitating a weapon for self-protection. These were balanced against mitigating factors of a "relatively insignificant record of criminal conduct," including the fact Smith had no prior felonies. The report also noted

that Smith had lost his house since his arrest and has had to live in motels. Smith had "few family members who are available to help," thus making it difficult for him to "follow the reasonable terms" of any probation. And – back to the veracity point – the report concluded by noting Smith continued to deny having a drug problem and was not willing to seek treatment. He had not accepted responsibility for his actions and the department recommended denial of probation and imposition of sentence.

The day of the sentencing hearing, Smith's counsel filed a four-page written statement. The written statement made almost no mention of Smith's medical problems. It noted only that probation would "enable [Smith] to remain at home where he can get proper medical care and attention and have the opportunity to be a productive member of society." Rather, the focus of Smith's written statement was on minimizing the import of the weapons, emphasizing there had been no attempted use of a deadly weapon, and no prior felony convictions. The statement also tried to minimize the significance of the handgun possession by saying, in essence, that possession of firearms comes with the territory when one is selling methamphetamine. It also pointed out that the total weight of the baggies came in under one ounce.

At the actual hearing, once again no issue was made of Smith's medical condition. His attorney, following the outlines of the written statement, repeated his focus on minimizing the impact of the firearms possession by pointing out all of Smith's guns were "all legally registered and licensed," and Smith had been a life-long "collector of firearms." While his counsel also made a fairly brief, and undeveloped, reference to his client's health (the entirety of which is quoted in the margin[2]), counsel certainly did

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[2] "And, your Honor, considering all the facts and considering also Mr., Smith – I don't know if the court can tell, but he has a colostomy bag. And I believe it was the second day that we were here in trial. We had to cut the day short so that he can go, in regards to a pacemaker, difficulty he was having. He has a whole host of medical issues. And, your Honor, he in fact was just approved for surgery. He has an appointment with his doctor on Wednesday on the 14th of May in order to get the specifics of the colon surgery ready. [¶] So I'm asking the court, grant him probation so that he can be a productive member of society again, to shape his behavior. . . . ."

not argue that California prisons could be assumed not to be up to the task of adequately treating his conditions.

Next, Smith himself addressed the court. He didn't mention his health at all. Like his counsel, he emphasized facts that might minimize the gravity of the firearm count, arguing, for example, that his son needs a wheelchair, and so needs a gun for protection. Nor did Smith make any confession of guilt as to the methamphetamine (which made it impossible to demonstrate remorse). Smith blamed his nephew for the presence of the drugs; it was his nephew who was the drug dealer.

At the conclusion of the hearing, Smith's counsel made a pro forma Eighth Amendment objection to a prison sentence, but with no elaboration (we quote it all in the margin[3]). In imposing a six-year sentence, the trial judge specifically noted what the probation report had found troubling, namely, the anomaly of Smith's admitted daily methamphetamine use from about ages 25 to 60 in light of his insistence, at age 64, that he wasn't an addict. For the judge, either Smith had "no awareness of the drug issues," or he was lying. He noted an absence of remorse and a pattern of not comprehending any wrongdoing.

III. DISCUSSION

A. *Eighth Amendment Issue*

For more than a decade now, the delivery of medical services in California's prison system has been in the hands of a receiver. (See *Plata v. Schwarzenegger* (N.D. Cal. 2005, C01-1351-TEH) [nonpub. opinion] 2005 U.S.Dist. LEXIS 43796.) In 2010, the receivership was affirmed by the United States Supreme Court in *Brown v. Plata* (2011) 563 U.S. 493. The receiver's powers were (and continue to be) extensive, including control of the entire "'medical delivery component'" of the

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3 "The court: Okay, Anything further?
"[Public Defender]: Yes, Your Honor. I would just like to make an objection on the record for – under the Eighth Amendment regarding sentence, your honor."

Department of Corrections. (*In re Estevez* (2008) 165 Cal.App.4th 1445, 1450.) Among the receiver's duties from the beginning were to structure and develop a "'constitutionally adequate medical health care delivery system.'" (*Ibid*.)

We may assume, over the course of the past 10 years (nine years if one counts backwards from the date of Smith's sentencing) that the receiver has conscientiously pursued his mandate. (See Civ. Code, § 3548 [general jurisprudential presumption that the law has been obeyed].) And indeed, federal courts have, generally speaking, noted at least some improvement in prison medical conditions over this period. (See *Aluya v. Management & Training Corp.* (E.D. Cal., July 13, 2015, 1:13-CV-1209 AWI JLT) [nonpub. opn.] 2015 U.S.Dist. LEXIS 90775 at p. 12 [noting that the receivership has pursued "a number of improvements to medical care in the California prison system," including efforts to control exposure of inmates to Valley Fever]; *Hines v. Youssef* (E.D. Cal., May 19, 2015, 1:13-CV-0357 AWI JLT) 2015 U.S.Dist. LEXIS 65441 [same].) News reports have also indicated some improvement in medical conditions, even to the point that incremental lifting of the receivership may be in sight.[4]

The point is important, because, given this record – indeed, given *this* record in particular – we cannot say the trial court was constitutionally required to operate on the assumption that Smith will *not* receive constitutionally adequate medical care during his incarceration. No facts in that regard were presented to the trial court, and nothing else would require it, as a matter of law, to adopt that assumption.

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[4] E.g., Los Angeles Times (July 13, 2015) *California regains control over healthcare at Folsom prison*: "J. Clark Kelso, the overseer of prison medical care and spending, returned responsibility for the health of some 2,400 inmates at Folsom State Prison to California's corrections department on Monday. [¶] He promised to restore the same authority for more of the state's other 33 lockups in coming months. [¶] 'This is the beginning of a significant movement of the case,' Kelso said in an interview, contemplating an end to nearly a decade of federal intervention spurred by a 2001 lawsuit over prison conditions." <http://www.latimes.com/local/political/la-me-ff-california-regains-control-healthcare-folsom-prison-20150713-story.html> [as of Nov. 19, 2015]; California Health Line, *Judge Could End Federal Oversight of California Prison Health Care* at http://www.californiahealthline.org/articles/2015/3/11/judge-could-end-federal-oversight-of-california-prison-health-care [as of Nov. 19, 2015].

People v. Superior Court (Himmelsbach) (1986) 186 Cal.App.3d 524, controls.[5] There, the defendant was convicted of crimes for which he was statutorily not eligible for probation. (*Id*. at p. 529.) Nevertheless, the trial court did not send him to prison, citing three factors which would make a prison sentence cruel and unusual punishment, the most dramatic of which were that the defendant was the son of the county district attorney and had a physical appearance (blond and slender) that rendered him an easy target for sexual abuse. (*Id.* at p. 530.) (The other factor was a lack of criminal record.) And yet, despite what common sense would dictate was an *extremely* high probability of inmate violence, the appellate court granted a writ directing the trial court to vacate the disposition on the ground that its conclusion concerning cruel and unusual punishment was "wholly unsupported." (*Id*. at p. 535.)

The *Himmelsbach* court reasoned this way: It first recognized that prison conditions which subject an inmate to a "continual unreasonable risk of sexual assault or violence at the hands of fellow prisoners" could, indeed, constitute cruel and usual punishment. (*Himmelsbach, supra,* 186 Cal.App.3d at p. 534.) But the court held that evidence of such an unreasonable risk had to be presented to the trial court, it couldn't just be assumed as a matter of common sense. The court said: "However, in this case, there has been no showing of such risk to defendant. While it is conceivable that incarceration in state prison might pose special dangers for defendant and ordinary security measures might not suffice, *the defense did not make any such argument or present any facts to substantiate that contention on the record*. Moreover, there was *no evidence that state correctional officials could not or would not provide any additional safeguards* necessary to ensure defendant reasonable personal protection. Consequently, the trial court's conclusion that any state prison sentence would constitute cruel and unusual punishment was unfounded." (*Id*. at pp. 534-535, fn. omitted, italics added.)

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[5] *Himmelsbach* was disapproved on another ground by *People v. Norrell* (1996) 13 Cal.4th 1, 7, fn. 3.

Here the very conditions Smith fears – inadequate medical treatment of prison inmates – has been the subject of intense federal judicial scrutiny for about a decade. If the unconstitutionally adverse outcome was merely "unsupported" speculation in *Himmelsbach*, it most certainly is here too, where Smith *himself* didn't even think enough of his medical problems to mention them to the trial judge when he addressed the court.

If one removes the assumption that Smith will not receive adequate medical care in prison, the second prong of his argument – that his sentence amounts to a de facto LWOP – falls apart. Smith makes no argument that determinate sentencing laws as regards *adults* are unconstitutional because they may require a sentence that overlaps with an offender's remaining life expectancy. As far as adult offenders are concerned, California's determinate sentencing laws operate without reference to a defendant's age, and there is no Constitutional common law doctrine limiting adult sentences that might otherwise overlap a prisoner's life expectancy. (Cf. *People v. Perez* (2013) 214 Cal.App.4th 49, 55-57 [discussing jurisprudence precluding LWOPs and de facto LWOPs from being applied to juvenile offenders].)

A good example of this point may be found in *People v. Karsai* (1982) 131 Cal.App.3d 224. There, the court held that California's determinate sentencing laws passed constitutional muster as against a cruel and unusual challenge even though they allowed for "unlimited enhancements and the provision for full, separate and consecutive sentence[.]" (*Id*. at p. 240.) The possibility of unlimited enhancements could result in a sentence that exceeded the life span of even a younger adult inmate. Nevertheless, the *Karsai* court held such a possibility did not offend the Eighth Amendment. (*Id*. at p. 231.)[6] From *Karsai* we may infer that the possibility six years will overlap a large portion (conceivably even all) of Smith's remaining, health-adjusted downward, life

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6 *Karsai* was disapproved on another ground by *People v. Jones* (1988) 46 Cal.3d 585, 592, footnote 4.

expectancy cannot be said to offend, by itself, prohibitions on cruel and unusual punishment.

B. *Probation Denial*

The standard of review for a trial court's decision to deny probation is abuse of discretion. (*People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1091 ["The decision whether to grant or deny probation is reviewed under the abuse of discretion standard"].) On such a standard, the trial court's decision here easily passes the test. The probation report noted that Smith's personal circumstances were such that it was likely he would return to drug dealing as his preferred occupation, a fact supported by his own refusal to acknowledge the obvious – he was convicted for dealing a terrible, illegal drug. That fact made his attempts to minimize his firearm collection particularly unconvincing: The court had to decide whether to give probation to an admitted life-long methamphetamine addict who was also an admitted life-long firearm collector. Smith's fragile health, of course, was a factor that counted in his favor, but, as we have noted above, even Smith himself did not make a plea based on his health when he had the chance to address the court.

All of that said, we are not unsympathetic in regard to Smith's physical limitations. We certainly cannot say that the trial court would have abused its discretion if it had decided the other way. Though we affirm his sentence, we note that Smith retains the right to seek relief if prison conditions in regard to his medical conditions do not meet Eighth Amendment standards. (See *In re Coca* (1978) 85 Cal.App.3d 493 [affirming trial court order requiring Department of Corrections to provide certain minimal facilities for prisoner who had had colostomy but did not have appliance]; accord, *People v. Superior Court (Beasley)* (1984) 159 Cal.App.3d 131, 133 [court retains jurisdiction to insure prison conditions do not fall below Eighth Amendment requirements].)

IV. DISPOSITION

The judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.